Supreme Court, U.S.
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No. 94-418

In the Supreme Court of the United States

OCTOBER TERM, 1994

BILLIE A. SHAW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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9 pp

QUESTION PRESENTED

Whether the cause of action for damages against the United States created by Section 7433 of the Internal Revenue Code, for the reckless disregard of internal revenue laws or regulations "in connection with any collection of Federal tax" (26 U.S.C. 7433(a)), also applies in connection with the determination and assessment of tax.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 20 F.3d 182. The opinion of the district court (Pet. App. 9a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1994. The petition for rehearing was denied on June 7, 1994. The petition for a writ of certiorari was filed on September 2, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1988, the Internal Revenue Service made assessments against petitioner under 26 U.S.C. 6672(a). That statute provides that any person responsible for withholding or paying over certain taxes on behalf of an employer, who willfully fails to do so, is liable for a "penalty" in the amount of the taxes due. *Ibid.* The assessments made against petitioner under this statute totalled approximately $81,000 (Pet. App. 11a).

In 1989, the Service collected part of the penalties that had been assessed against petitioner (Pet. App. 3a, 12a-13a). In 1990, however, the Service determined that petitioner was not properly liable for this penalty and the assessments were abated (*id.* at 3a-4a, 13a). Petitioner thereafter submitted a claim for refund and, in 1991, the Service refunded the amounts collected, plus interest (*id.* at 3a-4a, 13a).

While petitioner's claim for refund was pending, she commenced this action in district court under Section 7433 of the Internal Revenue Code. That statute authorizes suits for damages against the United States for the reckless disregard of any internal revenue law or regulation "in connection with any collection of Federal tax" (26 U.S.C. 7433(a)). Petitioner alleged that the Service had wrongfully assessed and collected the taxes against her and sought damages of $100,000 (Pet App. 4a, 13a).

2. A cause of action may be brought under Section 7433 only if all available administrative remedies have been exhausted. 26 U.S.C. 7433(a). The district court held that petitioner "failed to avail herself of the available appellate remedies offered through the Internal Revenue Service, and of which she received notice," and that "the failure to exhaust those administrative

remedies bar[red] the present action" (Pet. App. 14a). The court noted that the requirements of Section 6672 had been disregarded by the revenue officer who made the initial "penalty" assessments against petitioner (Pet. App. 14a). The court did not, however, find the actions thereafter taken by the Service to collect (and ultimately to refund) the assessments to be in violation of any internal revenue law or regulation. See *id.* at 13a-14a.

3. The court of appeals affirmed (Pet. App. 1a-7a). The court first concluded that petitioner's action was not barred by her failure to exhaust administrative remedies. The court held that petitioner "was not required to exhaust any administrative remedies" because her action had been filed before the Service promulgated regulations establishing the administrative remedies to exhaust under this statute (*id.* at 5a).

The court concluded, however, that petitioner's claim for relief under Section 7433 was defective because that statute creates a cause of action only for violations of law "in connection with any collection" of federal taxes (26 U.S.C. 7433(a)). The court held that "based upon the plain language of the statute, which is clearly supported by the statute's legislative history, a taxpayer cannot seek damages under § 7433 for an improper assessment of taxes" (Pet. App. 6a). The court pointed out that, "although the IRS improperly assessed tax liability against [petitioner], it did not engage in improper collection procedures" (*id.* at 6a-7a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

Section 7433 of the Internal Revenue Code provides a cause of action for damages against the United States if, "in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any [internal revenue law or regulation]" (26 U.S.C. 7433(a)). The plain language of this statute applies only to unauthorized *collection* activities; it does not authorize actions for a wrongful *assessment* of tax. The statute, which is entitled "Civil damages for certain unauthorized collection actions," authorizes suit only where a disregard of internal revenue laws or regulations occurs "in connection with any collection of Federal tax" (*ibid.*).[1]

As the court of appeals noted in this case (Pet. App. 6a), the text of Section 7433 reflects the expressed intention of Congress that "[a]n action under this provision may *not* be based on alleged reckless or intentional disregard in connection with the *determination* of tax." H.R. Conf. Rep. No. 1104, 100th Cong., 2d Sess. 229 (1988) (emphasis added). Indeed, the conference committee flatly rejected an amendment proposed by the Senate that would have "granted

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[1] When Congress provides relief for an erroneous *determination* of tax liability, it employs appropriate language. For example, Section 7430 of the Internal Revenue Code provides for the recovery of attorneys fees (but not damages) in certain federal tax litigation brought "in connection with the *determination*, collection, or refund of any tax, interest, or penalty" (26 U.S.C. 7430(a) (emphasis added)). Petitioner errs (Pet. 11) in invoking *Beaty* v. *United States*, 937 F.2d 288 (6th Cir. 1991), which addressed a request for attorneys fees under 26 U.S.C. 7430 in connection with an action challenging the determination of a tax and which separately sought damages for unlawful liens and other collection activities. See 937 F.2d at 290-292.

[taxpayers] the right to sue * * * for damages * * * in connection with the *determination or collection* of any Federal tax" (*id.* at 228 (emphasis added)). The conference committee explained that "the provision [as enacted] is limited to reckless or intentional disregard in connection with the *collection* of tax" (*id.* at 229 (emphasis added)).

In *Gonsalves* v. *IRS*, 975 F.2d 13 (1992), the First Circuit agreed that "[t]he legislative history of Section 7433 tells us that 'an action under this provision may not be based on alleged * * * disregard in connection with the determination of tax'" (*id.* at 16 (quoting H.R. Conf. Rep. No. 1104, *supra*, at 229)). The court explained in *Gonsalves* that (*ibid.*):

> Taxpayers who wish to challenge the IRS' calculation of their tax liability must file either a petition for redetermination in the Tax Court, 26 U.S.C. §§ 6213, 6214, or a refund action in the district court. 26 U.S.C. § 7422. Section 7433 was not intended to supplement or supersede, or to allow taxpayers to circumvent, these procedures.

The two courts of appeals that have decided this question have thus agreed that Section 7433 does not create a cause of action for the wrongful determination and assessment of a tax.[2] Further review is therefore not warranted.

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[2] In *Crowd Management Services, Inc.* v. *United States*, 792 F. Supp. 87 (D. Or. 1992), the district court stated that an assessment represents "a collection action" for purposes of Section 7433 but held, on the facts of that case, that no unauthorized activity had occurred (792 F. Supp. at 92). The Ninth Circuit affirmed that decision in part and reversed in part in an unpublished opinion that, under Rule 36-3 of the Rules of the Ninth Circuit, may not be cited as precedent. See 74 A.F.T.R.2d 94-6372 (Sept. 6, 1994),

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1994

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superseding 74 A.F.T.R.2d 94-5018 (June 1, 1994). The additional district court decisions cited by petitioner (Pet. 7, 9, 10) obviously do not establish any conflict among the courts of appeals.